APPENDIX

OPINIONS BELOW

Memorandum of Appellate Division, Supreme Court of the State of New York, reported in 282 App. Div. 747.

People, &c., res, v. Breslin, ap—Defendant appeals from a judgment of the County Court, Kings County, convicting him of criminal contempt of court and from "each and every intermediary order therein made." Judgment unanimously affirmed (Matter of Grand Jury of County of Kings [Nicastro-Chadeayne], 279 App. Div., 915, aff'd 303 N. Y., 983). No separate appeal lies from the intermediate orders, which have been reviewed on the appeal from the judgment of conviction (Code of Criminal Procedure, sec. 517).

Per curiam opinion of the Court of Appeals of the State of New York, reported in 306 N. Y. 294, 118 N. E. 2d 108.

In view of the constitutional provision that no person "shall * * * be compelled in any criminal case to be a witness against himself", N. Y. Const. art. I, §6, defendant Breslin was free to refuse to answer questions put to him when he appeared before the grand jury, on the ground that his answers might tend to incriminate him, unless, in return for the required testimony, he was granted an "immunity * * * so broad that the risk of prosecution [was] ended altogether." Matter of Doyle, 257 N. Y. 244, 250-251, 177 N. E. 489, 491, 87 A. L. R. 418. Such was the situation here; the provisions of the applicable statutes, prior to their amendment in 1953. Penal Law, Consol. Laws c. 40, §§381, 584, 996, as well as today, L. 1953, ch. 891, cloaked defendant with an immunity as broad as the privilege guaranteed by the Constitution. In other words,

a witness compelled to testify before a grand jury inquiring into the commission of crimes of bribery, conspiracy or gambling obtained a full and complete immunity from prosecution in this state for any crime disclosed or revealed by his testimony. See, e.g., Matter of Doyle, 257 N. Y. 244, 177 N. E. 489, supra; Matter of Rouss, 221 N. Y. 81, 116 N. E. 782; Matter of Grand Jury of Co. of Kings [Nicastro-Chadeayne], 279 App. Div. 915, 110 N. Y. S. 2d 532, affirmed 303 N. Y. 983, 106 N. E. 2d 63; People v. Florentine, 276 App. Div. 730, 97 N. Y. S. 2d 553; People ex rel. Coyle v. Truesdell, 259 App. Div. 282, 18 N. Y. S. 2d 947; People v. Reiss, 255 App. Div. 509, 8 N. Y. S. 2d 209, affirmed 280 N. Y. 539, 20 N. E. 2d 8; People v. Cahill, 126 App. Div. 391, 110 N. Y. S. 728, affirmed 193 N. Y. 232, 86 N. E. 39, 20 L. R. A., N. S., 1084. It follows, therefore, that defendant was not entitled to remain silent, even if, as he urges, he believed himself one of the targets of the investigation rather than a mere witness. His refusal to answer the questions posed, after the court advised him that he had immunity and directed him to answer, constituted basis for the contempt of court conviction.

The judgment should be affirmed.

Lewis, C. J., and Conway, Desmond, Dye, Fuld, Froessel and Van Voorhis, JJ., concur.

Judgment affirmed.

Order of the Court of Appeals of the State of New York, March 12, 1954, granting petitioner's motion to amend the remittitur.

"Further ordered, that the said motion, insofar as it seeks to amend the remittitur, be and the same

hereby is granted. Return of remittitur requested and, when returned, it will be amended to read as follows:

Judgment affirmed. Upon this appeal there was presented and passed upon the following question: whether defendant had been deprived of liberty without due process of law and whether there had been an abridgment of defendant's privileges and immunities as a citizen of the United States under the Fourteenth Amendment of the Constitution of the United States. This Court held that there was no denial of any constitutional right of the defendant.

And the County Court, Kings County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

"A copy

[Sgd.] Raymond J. Cannon
[seal] Clerk"

Opinion of the Supreme Court, State of New York, County of Kings, reported in 128 New York Law Journal at p. 1147, col. 1 (November 13, 1952).

SUPREME COURT—SPECIAL TERM, PART I.

By Mr. Justice Norton.

People, &c., v. Breslin—This is an application by the petitioner for an order removing the trial of the perjury indictment against him from the County Court, Kings County to this court pursuant to the provisions of section 344 of the Code of Criminal Procedure which permits a transfer "for good cause shown." It appears that the

petitioner herein was indicted by a County Court Grand Jury of Kings County charging him with knowingly, willfully and corruptly committing the crime of criminal contempt of court; that thereafter he was arraigned upon said indictment in the County Court of said county and entered a plea of not guilty. Subsequent thereto a motion was made to dismiss the said indictment and that at the time appointed to hear said motion the county judge presiding made the observations and statements contained in the moving papers herein, and the petitioner claims that by reason of such statements and observations by the presiding judge at said time good cause exists for transferring the trial of the perjury indictment against him from the County Court to the Supreme Court of Kings County.

Under the rules of the County Court of Kings County the trial of this indictment will be had before the county judge who it is claimed made the remarks and observations complained of. While the district attorney in the affidavit submitted in opposition does not concede the correctness of the exact language attributed to the county judge on the occasion in question, there is no denial of the substance thereof. Neither do I have an affidavit from the county judge denying or repudiating the language attributed by the petitioner herein. I find nothing set forth in the papers herein which indicates that a fair trial could not be had before the county judge in question. However, courts are always solicitous in the safeguarding of the constitutional rights of a defendant and in maintaining complete impartiality in the trial of criminal cases. As was said in the case of People, &c., v. McDermott (180 Misc., 247): "It is axiomatic that a proper administration of the law demands not only that courts and judicial officers refrain

from actual bias but that they avoid any appearance of unfairness known as implied bias."

A defendant in a criminal case has a right to apply for the removal of the indictment, and if good cause therefor has been shown his application must be granted since it is the right of every person accused of a crime to have a fair and impartial trial; and if it appears that the judge who is to preside at the trial has made any alleged remarks or observations prior thereto from which any unfavorable inferences may be drawn of a preconceived opinion of the guilt of the accused, the application must be granted.

There are five county judges in the County Court, Kings County. The court would suggest that this defendant be brought to trial before another judge of that court, if possible. If such action is taken the application will be denied; otherwise the application is granted.

Memorandum of the Supreme Court, State of New York, County of Kings, per Norton, J., on reargument, reported in 128 New York Law Journal at p. 1331, col. 7 (December 1, 1952).

People, &c., v. Breslin—The People, by the district attorney of this county, moved for a reargument of the court's decision heretofore made in this matter. With the consent of counsel, his motion will be considered as a rehearing rather than a reargument. The rehearing is granted. The court has considered the additional papers submitted and finds nothing therein which would in any way alter or change the conclusions reached by the court on the original application and the original decision will be adhered to.

Memorandum of the Appellate Division, Supreme Court, State of New York, denying review of the decision of Justice Norton, reported in 281 App. Div. 830.

SECOND DEPARTMENT, FEBRUARY, 1953.

(February 2, 1953.)

2

In the Matter of MILES F. McDONALD, as District Attorney of the County of Kings, Petitioner, against ALFRED V. NORTON, as a Justice of the Supreme Court of the State of New York, et al., Respondents.—Application denied and proceeding dismissed, without costs. The respondent Justice of the Supreme Court, by his decision, has not indicated that he is proceeding contrary to the provisions of subdivision 1 of section 344 of the Code of Criminal Procedure, or that he has exceeded the powers thereby granted. (Cf. *Matter of Murphy* v. *Supreme Court*, 294 N. Y. 440, 445.) Present—Adel, Acting P. J., Wenzel, MacCrate, Schmidt and Beldock, JJ.

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FILED
MAY 17 1954
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

October Term, 1953

Docket No. 724

JAMES J. BRESLIN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This is a petition for a writ of certiorari to review a judgment of a state court of last resort, the New York Court of Appeals, rendered March 12, 1954, affirming the conviction of petitioner for the crime of criminal contempt of court (*People* v. *Breslin*, 306 N. Y. 294, 118 N. E. 2nd, 108). The indictment and subsequent judgment are posited upon a New York statute which declares that the contumacious and unlawful refusal of a witness to answer any legal and proper interrogatory constitutes the crime of criminal contempt (*New York Penal Law*, Section 600).

Questions Presented

1. Is the contention urged in Point I of petitioner's brief concerning the alleged prejudice of a presiding judge properly preserved for review in this Court?

2. Does the due process clause of the Fourteenth Amendment to the Constitution of the United States protect a citizen of the State of New York against compulsory self-incrimination in the courts of that state?

3. If this clause of the Fourteenth Amendment does apply, do the facts and circumstances in this record evidence a denial to petitioner of due process?

Record Facts

Petitioner was duly indicted by a Grand Jury of the County of Kings of the State of New York.

The indictment avers that the December 1949 Grand Jury of the County of Kings has been conducting an inquiry into the activities of gamblers, criminals and racketeers in the County of Kings (18).* In October, 1952, the specific subject of inquiry was:

> "to ascertain whether any plainclothes police officers of the City of New York, of whatever rank, who were charged with the specific duty of enforcing the laws against gambling and vice, had received bribes from bookmakers and gamblers within the County of Kings; whether any of said police officers were protecting said bookmakers and gamblers within the

* Numerals refer to folios in the Record.

> County of Kings and for money or other consideration paid to said police were affording them immunity from detection, arrest and prosecution for violation of the laws against gambling and whether any of said police officers had financial assets or income which he could not account for, from legitimate sources" (19, 20).

It is then averred that between May of 1944 and January, 1947, petitioner was a plainclothesman in the Police Department of the City of New York and was assigned in that capacity to the office of the Police Commissioner of the City of New York (21). On July 2, 1952, petitioner appeared as a witness before the said Grand Jury. An oath was duly administered to him. *He did not execute a waiver of immunity* as permitted by law (21, 22) *

The examination of petitioner was thereafter adjourned and he reappeared before the Grand Jury on October 3, 1952, on which date he was asked whether he had a safe deposit box (23). He refused to answer said question or any other queries concerning his financial standing or his activities in the Police Department (23).

Thereafter and on said 3rd day of October, 1952, a Judge of the County Court upon application therefor duly made, directed petitioner to answer the question before said Grand Jury. Later on the same day, he was again asked in the Grand Jury whether while he was in the Confidential Squad of the Police Commissioner's Office as a plainclothesman, he had a safe deposit box. He refused to answer said

---

* New York Penal Law Section 2446 permits any witness to waive his privilege against self incrimination or the benefits of any immunity statute by a written instrument.

question (24). The indictment then avers that these questions were legal and proper:

> "in that said Grand Jury was investigating whether the defendant had purchased a home at Breezy Point, in the State of New York, and whether he had paid approximately $5,000.00 in United States currency in denominations of $10.00 and $20.00 on account of the purchase price thereof; whether said defendant had entered into a partnership and had purchased an interest in and to the Allservice Refrigeration Company, and whether the said defendant had invested the sum of approximately $36,000.00 in cash in said company and whether all of said monies herein referred to were received by said defendant as bribes to afford police protection to bookmakers and gamblers in the County of Kings, and said interrogatories related to and were pertinent to said matters" (25, 26).

The indictment concludes with the accusation that petitioner's refusal constituted a contempt of court and the Grand Jury thereby charged petitioner with said crime (26, 27).

The People's Case

The witnesses adduced on behalf of the prosecution were **Pincus Weinschenker** (a Clerk of the County Court), **Julius W. Koch** (an employee in the Clerk's office of the Police Department of the City of New York), **Raymon H. Chadeayne** (Foreman of the December 1949 Grand Jury), **Thomas J. Donlan** (an Assistant District Attorney in the County of Kings, attached to the Special Investigation), and **Harriet Perlman** (Grand Jury stenographer).

A precis of their testimony is as follows:

Mr. Weinschenker testified as to the original empanelling of the December 1949 Grand Jury and recited the various orders of the extension of its term (147-152). Further interrogation of this witness was suspended upon petitioner's concession that "the grand jury was duly in existence on the dates referred to in the indictment here, and that the petitioner, was properly called or legally called as a witness before that grand jury" (153).

Mr. Koch testified that a plainclothesman is a member of the uniformed force assigned to enforce gambling laws and, as the nomenclature indicates, he performs his duty in civilian clothes (169, 170). A squad of plainclothesmen is attached to each police inspection division (169) and a similar plainclothes squad is attached to the office of the Police Commissioner of the City of New York.

Petitioner joined the police force on November 21, 1942 (175). It was stipulated that between May 16, 1944 and January 6, 1947, he was a plainclothesman assigned to the office of the Police Commissioner of the City of New York (177-179). His salary as a police officer did not exceed the sum of $3,700 in any year (182).

Mr. Chadeayne, Foreman of the Grand Jury, testified that petitioner appeared as a witness before that body on July 2, 1952, when an oath was duly administered to him (186, 187).

At no time did petitioner execute a waiver of immunity (188). On September 26, 1952, petitioner reappeared as a witness before the Grand Jury and requested an extension of time to complete the questionnaire (189). On October 3,

1952, he again appeared as a witness before the Grand Jury. As a matter of fact, he appeared twice on that day; once in the morning and again in the afternoon (189). In the morning of October 3rd, a question was put to petitioner which he refused to answer. Thereafter proceedings were instituted before County Judge Samuel S. Leibowitz (190). Petitioner subsequently returned to the Grand Jury and was again asked the question which he still refused to answer (191).

The Grand Jury then was investigating organized gambling in Kings County, rackets and the relations between gamblers and members of the Police Department. The purpose thereof "was to determine whether the assets of the various persons were in line with their sources of legitimate income" (194).

Mr. Donlan testified that he was a Special Assistant District Attorney of the County of Kings assigned to the Rackets Investigation being conducted by the December 1949 Grand Jury (219). He was in charge of the investigation of the finances of present and former policemen (220). In July, 1952, and thereafter up to October, 1952, the Grand Jury in conjunction with the District Attorney, was conducting an investigation into the financial condition of petitioner and the latter was given a financial questionnaire (221).

When Breslin appeared as a witness before the Grand Jury in July, 1952, the District Attorney and the Grand Jury were "investigating an interest of (petitioner) in a business, specifically a refrigeration business called The Bevador Sales Corporation" (231). They were also checking various other aspects of his financial condition (232,

233). Moreover, the Grand Jury was investigating an investment of $23,000 or $24,000 which was made jointly by petitioner and another individual in another refrigeration business (235). Further inquiry concerned a purchase that petitioner had made of a home at Breezy Point, the price of which to the extent of $5,500 had been paid "in small bills, ten and twenties" (237, 238). It was concerning the foregoing matters that the Grand Jury intended to question petitioner on the occasions of his appearances before it (239, 240). The investment by him in the Bevador Sales Corporation was made on June 7, 1951, three months after he resigned from the Police Department (248).

The purpose of Mr. Donlan's testimony was to establish the subject matter of the investigation before the Grand Jury. It is not the refusal to answer *any* question which constitutes the crime of contempt, but only one that is "legal and proper". It was incumbent, therefore, upon the People to establish that the question which appellant refused to answer and upon which the contempt was predicated bore a reasonable relation to the subject matter of the investigation.

Mrs. Perlman testified to the accuracy of petitioner's testimony before the Grand Jury on July 2, 1952 and a transcript thereof was marked for identification as People's Exhibit 7 (269-276). The testimony of petitioner before the Grand Jury on October 3, 1952, was likewise authenticated by Mrs. Perlman and marked in evidence as People's Exhibit 8.

Testimony of Petitioner before the Grand Jury on His First Appearance July 2, 1952

From People's Exhibit 7 for identification, the prosecutor read into the record the following testimony (284-286):

"James J. Breslin, residing at No. 26 93rd Street, Brooklyn, New York, having been duly sworn, was called as a witness and testified as follows:

Q. What is your name, sir? A. James J. Breslin.

Q. And your address? A. 26 93rd Street, Brooklyn, New York.

Q. Were you a member of the Police Department? A. Yes, I was.

Q. Did you resign from the Police Department? A. I did.

Q. When did you resign? A. I believe it was March 7, 1951.

Q. Did you sign a waiver of immunity? A. No, I did not."

Testimony of Petitioner before the Grand Jury on His Initial Appearance on October 3, 1952

From People's Exhibit 8 in evidence, the following was read into the record at folios 288-292.

"James J. Breslin, residing at 26—93rd Street, Brooklyn, New York, having been previously sworn, was recalled as a witness and testified as follows:

By Mr. Koota:

Q. You appeared for the first time before this Grand Jury I believe during the summer of 1952? A. That's correct.

Q. Did you sign a waiver of immunity? A. No, sir, I did not.

Q. In July, 1952, were you a member of the Police Force? A. No.

Q. Had you resigned or retired? A. Yes.

Q. Which was it? A. I resigned in March, 1951.

Q. Were you ever in the investigating unit of the Police Commissioner's office while you were in the Police Department? A. Yes, I was.

Q. Do you have a safe deposit box? A. I refuse to answer.

Q. Do you want to make a statement? A. I do. I find myself in a very awkward position. I am a private citizen not involved in any conspiracy or criminal action. I am a God-fearing man with an abhorrence of perjury. Through confusion or misunderstanding on my part, in writing or verbally, I may innocently perjure myself and find myself to be a defendant. I would like to exercise whatever constitutional rights are mine. I prefer not to degrade or incriminate myself. As a consequence, I choose to remain mute.

Mr. Koota: Will you remain outside, please?

(The witness returns.)

Mr. Koota: Just one more question, please?

Q. Do I understand then that if I were to put questions to you concerning your financial standing or concerning your activities in the Police Department you would remain mute relying on the statement and making the same statement you just announced? A. That's correct, sir."

Proceedings before County Judge Leibowitz on October 3, 1952 After Petitioner's Foregoing Refusal to Answer

Following petitioner's refusal to answer the question as to whether he had a safe deposit box, an oral application

was made before the Honorable Samuel S. Leibowitz, Judge of the County Court at Part I thereof to direct him to answer. Upon this trial, the minutes of the proceedings before Judge Leibowitz were marked as People's Exhibit 1 for identification (145). Only the following excerpt from the minutes of the proceedings before Judge Leibowitz was read into the record at folios 294-299:

"County Court of the County of Kings, Part VI; in the Matter of the Application of the December, 1949 Grand Jury to punish James J. Breslin for contempt. Before Honorable Samuel S. Leibowitz, County Judge; Brooklyn, New York, October 3rd, 1952; Appearances, Mr. Aaron E. Koota, Assistant District Attorney, For the People; Mr. Thomas J. Mackell, for the Respondent. Ralph E. Roberts, Official Stenographer:

The Court: What is this matter? Come up for a moment, please.

(There was a conference at the bench.)

The Court: Have you an application here, Mr. Koota?

Mr. Koota: I have, your Honor.

The Court: What is your application?

Mr. Koota: This is an application by the December, 1949 Grand Jury to punish one James J. Breslin for contempt of Court for refusal to answer any questions before the December, 1949 Grand Jury, and as a preliminary thereto we respectfully ask your Honor to instruct this witness to answer the questions and overrule the objections that he made.

The Court: Is Mr. Breslin in court?

Mr. Koota: He is, your Honor.

The Court: Where is he, please? Is he represented by counsel?

Mr. Koota: He is, your Honor.

The Court: State the name of counsel.

Mr. Mackell: Thomas J. Mackell, 3915 Main Street, Flushing.

Then there was a colloquy among the Court and counsel after this discussion:

Mr. Koota: I take it, your Honor that your Honor directs the witness to answer all the questions.

The Court: You are directed—'to this witness, to the defendant—'

You are directed to appear before the Grand Jury, and testify, and testify truthfully, because the Court rules that under the law you have immunity. The only immunity you have not got is from perjury. All right, go back before the Grand Jury and testify."

We digress momentarily to advert to an observation made by petitioner at page 9 of his brief that Judge Leibowitz "without making any inquiry to determine whether or not a possible answer would incriminate (him)" directed him to return to the Grand Jury. There is no basis for the suggestion that the Court did not make an inquiry. The minutes of the *entire* proceeding before the County Judge were not permitted to be read in evidence upon petitioner's objection (293, 294). The statement in his brief, therefore, that the Court did not conduct an inquiry is a gratuitous assumption.

Testimony of Petitioner before the Grand Jury on October 3, 1952 After His Appearance before Judge Leibowitz

This testimony was not read into the record *in extenso* but was quoted in People's summation (337-339). It is,

however, part of People's Exhibit 8 in evidence (279-282), the printing of which Exhibit in the record was omitted pursuant to stipulation (451-454).

That testimony is as follows:

"James J. Breslin, having been previously sworn, was recalled as a witness and testified as follows:

Q. Mr. Breslin, you have just appeared before County Judge Leibowitz in the County Court here on an application by this Grand Jury to punish you for contempt? A. That's correct.

Q. In that proceeding you were represented by an attorney? Mr. Mackell? A. Yes, sir.

Q. Is the name of your attorney Thomas J. Mackell of 39-15 Main Street, Flushing, New York? A. Yes, sir.

Q. And did Judge Leibowitz after listening to the District Attorney and to Mr. Mackell direct you to return to this Grand Jury and testify? A. He did.

Q. I now ask you, Mr. Breslin, while you were in the Confidential Squad of the Police Commissioner's Office as a plainclothesman, did you have a safe deposit box? A. Mr. Koota, I reiterate my previous choice. I choose to remain mute.

Q. So that any further questions that I would put to you, you would refuse to answer? A. That's correct.

Q. When you say you choose to remain mute, you mean you would not answer the questions? A. That's correct."

The Defense

There was no defense. Petitioner elected not to testify in his own behalf.

ARGUMENT

POINT I

Petitioner's argument as to the prejudice of the presiding Judge is not properly preserved for review before this tribunal.

There are copious references in the petition to the alleged disqualification of Judge Leibowitz and that the indictment was returned by the Grand Jury acting under his direction. Suffice it to say the *record* does not support these conclusions, nor is their precise impact upon the issues *sub judice* apparent.

Moreover, no claim of prejudice was made at the trial or on the intermediate appeal to the Appellate Division of the Supreme Court of the State of New York or in the final resort to the Court of Appeals. It is therefore not properly the subject of review before this Court.

Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Section 77, Section 418;

Beauharnais v. *Illinois*, 343 U. S. 250, 264, 265;

McGoldrick v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434; 60 S. Ct. 670; 84 L. Ed. 849.

POINT II

The due process clause of the Fourteenth Amendment to the United States Constitution does not protect a witness against compulsory self-incrimination in a state court.

Whether the privilege against self-incrimination guaranteed under the Fifth Amendment to the United States Constitution is embraced within the due process clause so that contravening state action is thereby interdicted is no longer a matter of philosophical abstraction. This Court has held:

1. This privilege vouchsafed in the Fifth Amendment is not applicable to state procedures.
2. The privilege is not an essential element in due process and is therefore not protected by the Fourteenth Amendment against state action.

In *Adamson* v. *California*, 332 U. S. 46, this Court considered a California statute which permitted the failure of a defendant to explain evidence against him to be commented upon by counsel and considered by the court and jury. The validity of this statute was challenged under the due process clause of the Fourteenth Amendment as well as under the self-incrimination proviso of the Fifth Amendment. This Court held that the defendant's rights under the Fifth Amendment had not been abridged because that amendment did not control state action, but was referable only to federal conduct. This Court also reaffirmed the principle in *Twining* v. *New Jersey* (211 U. S. 78; 53 L. Ed. 97; 29 S. Ct. 14), and *Palko* v. *Connecticut* (302 U. S.

319; 82 L. Ed. 288; 58 S. Ct. 188), that exemption from compulsory self-incrimination in a state proceeding is not secured by any part of the Federal Constitution.

We acknowledge that the operative area of due process is not susceptible of precise delineation. This Court in *Rochin* v. *California*, 342 U. S. 165, at page 173, speaks of the general requirement

> "that states in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'."

Where the mechanics of prosecution in a state court degenerates into conduct which "shocks the conscience" (*Rochin, supra*, at page 172) it will be condemned.

A fair appraisal of this record will disclose that petitioner was accorded fair and just treatment and an utter absence of conduct which "shocks the conscience".

Immanent in any state judicial system, albeit subject to constitutional restriction, is the power to compel testimony. The action of a Grand Jury in the course of investigation into police corruption in seeking to elicit testimony from petitioner did not invade his right of privacy as he now contends. We think the "right of privacy" is wholly irrelevant to the issues herein. It is dilatorily asserted and was not previously urged in any of the courts below, either appellate or at *nisi prius*.

POINT III

Since under the law of New York petitioner was accorded complete immunity against criminal prosecution, his privilege against self-incrimination ceased and his conviction did not contravene the due process clause of the Fourteenth Amendment.

We shall assume *arguendo* that the due process clause in the Fourteenth Amendment is applicable to the state action disclosed in this record. This does not end the inquiry. We consider, then, in the proceedings at bar, was due process denied to petitioner? The record impels a negative reply. Petitioner's refusal to testify before the Grand Jury was without warrant in law. Any testimony which might have been elicited from him could not have been self-incriminatory because he had been granted complete statutory immunity from criminal prosecution. When petitioner appeared before the Grand Jury, that body was investigating into the possible commission of the crimes of Conspiracy (New York Penal Law, Section 580, *et seq.*), Gambling (New York Penal Law, Section 970, *et seq.*) and Bribery and Corruption (New York Penal Law, Section 370). At that time,* these statutes (Gambling, Section 996, Conspiracy, Section 584, Bribery, Section 381) provided that no person should be excused from testifying, but in the event he does

> "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any trans-

* These statutes have since been amended to define the method by which immunity could be obtained (Laws of New York, 1953, Chapter 891, effective September 1, 1953).

action, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial."

These immunity statutes are coextensive with the constitutional guarantee against self-incrimination and therefore supplant the privilege incorporated in the Constitution of the United States as well as that of New York (Article 1, Section 6).

Counselman v. *Hitchcock*, 142 U. S. 547;
Brown v. *Walker*, 161 U. S. 591;
Glickstein v. *U. S.*, 222 U. S. 139, 141;
Matter of Doyle, 257 N. Y. 244;
Matter of Grand Jury of the County of Kings (Nicastro-Chadeayne), 279 App. Div. N. Y. 915, aff'd 303 N. Y. 983.

The New York statutes granted petitioner adequate and complete immunity from prosecution in exchange for his testimony before the Grand Jury. He nevertheless wilfully refused to testify. His subsequent conviction in accord with New York State procedural law conformed to every constitutional concept and requirement of due process.

CONCLUSION

The arguments which petitioner advances to invoke jurisdiction are not embraced within the "character of reasons" suggested in Rule 38 of the Revised Rules of this Court, and we urge therefore that

The petition should be denied.

Dated, Brooklyn, New York
May 10, 1954

Respectfully submitted,

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